Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

IN THE MATTER OF: NICHOLAS R. ROBERTS
and the BUNCOMBE COUNTY BOARD OF EDUCATION,
Petitioners,

On Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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50 pp

QUESTION PRESENTED

In *Goss v. Lopez*, 419 U.S. 565 (1975) this Court found that the Due Process Clause did not require that a public school student be provided the right to counsel in the context of a short-term suspension (less than ten days). The question presented here is whether the Due Process Clause is violated by a public school long-term-suspension procedure which fully apprises the student of the charge against him and provides the student an opportunity to be heard concerning that charge, with the one limit that the student may not be represented by an attorney at the initial investigative hearing.

PARTIES TO THE PROCEEDING

The following entity and individual are the parties to the proceeding:

The Buncombe County Board of Education is the Petitioner. The Board was the respondent in Buncombe County, North Carolina Superior Court and the appellant in the North Carolina Court of Appeals and North Carolina Supreme Court.

Nicholas Roberts is the Respondent. Roberts was the petitioner in Buncombe County, North Carolina Superior Court and the appellee in the North Carolina Court of Appeals and North Carolina Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the North Carolina Supreme Court and North Carolina Court of Appeals in this case.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 150 N.C. App 86, 563 S.E. 2d 37. It is reproduced in Appendix A. The final order of the North Carolina Supreme Court dismissing petitioner's appeal as improvidently allowed is reported at 356 N.C. 660. It is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The North Carolina Supreme Court entered its final judgment dismissing petitioner's appeal on February 28, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV provides, in relevant part:

> "No state shall ... deprive any person of life, liberty, or property, without due process of law ...."

STATEMENT OF THE CASE

A. Factual Background

In the fall of 1996, Nicholas Roberts was a sophomore in the Buncombe County, North Carolina Public

School System. On October 11, 1996, Nicholas was suspended for five days by the school principal, with a further recommendation by the principal that Nicholas be suspended for the remainder of the semester. This disciplinary action was taken in response to Nicholas' behavior in English class, where he approached a female student who was seated, pushed the lower part of his body into her face, grabbed his crotch, and told her 'I'll be your partner anytime, and put "deeze nuts," in your mouth.'

The student to whom Nicholas made this comment and gesture reported the incident to an assistant principal at the high school later that same day. In response, the assistant principal spoke with several students who all gave written accounts of the incident. Nicholas was then called into the office, notified of the allegations made against him, provided an opportunity to respond to the allegations and told of the disciplinary consequences. Both of Nicholas' parents also met with school administrators that afternoon and were notified of the administration's recommendation to suspend Nicholas for the remainder of the semester.

A hearing board, which was comprised of six teachers from six different schools within the district, convened the following school day to consider the recommendation for long-term suspension. The rules concerning this procedure are found at Appendix C, page A13. This panel of educators was charged with determining whether Nicholas had violated board policy and making a recommendation to the principal and superintendent regarding what disciplinary action, if any, should be taken. School board policy dictated that the teacher from Nicholas' school act as the hearing panel convener, which included the additional authority to direct the hearing "proceedings and to control the conduct of all persons present, subject to the general direction of this procedural code. He may

limit questioning that is unproductively lengthy or irrelevant." There is no evidence that any member of the teacher panel had a legal background.

While Nicholas was not permitted to bring an attorney to the hearing, he and his parents were in attendance and were provided the opportunity to testify, to cross-examine witnesses called by administrators and to call their own witnesses. Prior to the hearing, Nicholas was provided written notice of the school rule he had violated and the conduct that constituted the violation, as well as the signed statements of all persons having information about his misconduct. At this initial hearing, seven witnesses testified, in addition to an administrator and Nicholas. Nicholas' mother was also provided an opportunity to address the hearing panel.

The hearing board voted unanimously to uphold the long-term suspension, and Nicholas appealed to the Buncombe County Board of Education. Nicholas and his parents were represented by counsel before the Board. At that hearing, the Board of Education reviewed a videotape of the hearing panel proceedings and heard oral arguments made on behalf of both parties. The school rules allowed Nicholas' attorney to request that the Board of Education hear further evidence "to avoid a substantial threat of unfairness" (Appendix C, p. A24), but no such request was made. The Board of Education upheld the suspension for the remainder of semester.

B. Proceedings Below

Pursuant to N. C. Gen. Stat. § 115C-391(c), Roberts sought judicial review, in the Buncombe County, North Carolina, Superior Court, of his long-term suspension. In an Amended Order filed on January 25, 2001, the trial judge reversed the suspension, ruling, *inter alia*, that the school rule

barring attorneys at the initial hearing board level constituted a denial of due process. The Board of Education appealed this ruling to the North Carolina Court of Appeals. The North Carolina Court of Appeals upheld the trial court, ruling:

> Under the facts of this case, where respondent sought to impose a long-term suspension and the Board Policy specifically provided for a factual hearing before the Hearing Board, we construe the Due Process Clause of the United States Constitution, applicable to the States through the Fourteenth Amendment, to require that petitioner have the opportunity to have counsel present, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.

In re Roberts, 150 N.C. App. 86, 93 (2002). As Nicholas was allowed to confront and cross-examine witnesses and to call witnesses of his own, the Court's ruling that Nicholas' due process rights were violated rests solely on its pronouncement that the Fourteenth Amendment required that Nicholas be allowed to have counsel present at the initial hearing.

The Board of Education requested review in the North Carolina Supreme Court, and in an Amended Order dated August 15, 2002 that court granted review. However, in an Order filed February 28, 2003, reported at 356 N.C. 660, the North Carolina Supreme Court dismissed the appeal as improvidently allowed.

REASONS FOR GRANTING THE PETITION

In contrast to this Court's holding in *Goss v. Lopez*, 419 U.S. 565 (1975), the North Carolina state courts have ruled in the present matter that a right to counsel attaches to long-term

suspension proceedings, even at an initial investigative hearing. When this Court decided *Goss*, it explicitly left for another day the issue of how the Due Process Clause impacted long-term suspension procedures. In the interim, the federal courts that have considered the issue have not found that a right to counsel applies to long-term suspension or expulsion proceedings. In light of the need for guidance in this area by school boards across the country, and the glaring inconsistency between the ruling by North Carolina courts in the present case and the analysis that has been provided by other courts, the present case raises an important question of federal constitutional law that has not been, but should be, settled by this Court.

A. The *Goss* Holding

In *Goss*, this Court analyzed the impact of the Due Process clause on short-term suspensions from school. Guiding principals were noted:

> [T]he interpretation and application of the Due Process Clause are intensely practical matters and ... "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). We are also mindful of our own admonition: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

Goss, 419 U.S. at 578.

Noting the teaching of *Grannis v. Ordean*, 234 U.S.

385, 394 (1914) that the fundamental requisite of due process of law is the opportunity to be heard, the *Goss* court held that in the context of a short-term suspension, the student must be given oral or written notice of the charges against him and, if the student denies them, an explanation of the evidence the authorities have and the opportunity to present the student's side of the story. *Goss*, 419 U.S. at 581.

The Court further explicitly ruled that the imposition of such requirements as the right to counsel was not required by the Due Process Clause:

> We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

Goss, 419 U.S. at 583.

B. The *Mathews* Holding

A year after the *Goss*, holding, this Court provided further instruction for the application of the Due Process Clause

in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35. *Goss* and *Mathews* have provided the framework in which state and lower federal courts have grappled with the application of the Due Process Clause to long-term suspension procedures.

C. The Application of *Goss* and *Mathews* Indicates That The Right to Counsel Does Not Attach to Long-Term Suspensions

The courts below have found that Nicholas was entitled to have an attorney represent him at the initial meeting with the local hearing board. The Board of Education respectfully argues that it could, consistent with due process rights, devise a policy which fostered the informal review of a student's conduct, and the appropriate discipline to apply, by minimizing its adversarial nature.

The three-pronged test of *Mathews* has been described by Judge Posner of the Seventh Circuit as being "consideration of the cost of the additional procedure sought, the risk of error if it is withheld, and the consequences of error to the person

seeking the procedure." *Osteen v. Henley*, 13 F. 3d 221, 226 (7th Cir. 1993). The Board's process must be judged by the generality of cases to which it applies, and therefore if it is sufficient for the large majority of the matters that come before it, then it is constitutionally sufficient for all of them. *Walters v. Nat. Assn. Of Radiation Survivors*, 473 U.S. 305, 321, 330 (1985).

Application of this test to the present case shows that no due process violation occurred. Looking first to the cost of mandating the presence of an attorney in the discipline procedure, a major cost would be the movement away from informal fact gathering to an adversarial hearing marked by contention.

> Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one — or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.

Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1288 (1975).

In crafting its policy, the board has determined that the burden on the school administration outweighs the benefit of allowing counsel at the expulsion hearings. As was noted in *Newsome v. Batavia Local School District*, 842 F.2d 920, 925-26 (6th Cir. 1988), school boards and administrators are

charged with a variety of responsibilities that are critical to the effective operation of our public schools. These include, but most definitely are not limited to, meting out punishment for violations of school rules, hiring and firing of teachers and other school personnel, planning curricula, meeting the dietary and health needs of the student population, supplying and maintaining school buildings, and providing extra-curricular activities. Id. Moreover, the school systems carry out these duties within the strict confines of an increasingly tighter budget. Id. Furthermore, to saddle school boards and administrators with the burden of overseeing a quasi-judicial proceeding is to require of them that which they are ill-equipped to perform. Id.

> "The detriment that will accrue to the educational process in general by diverting school board members' and school administrators' attention from their primary responsibilities in overseeing the educational process to learning and applying the common law rules of evidence simply outweighs the marginal benefit that will accrue to the fact-finding process by allowing [students' attorneys to participate in expulsion meetings]."

Id.

If it is determined that due process requires that students be represented by an attorney in expulsion meetings, it is likely that school systems will be forced to pay legal counsel for representation at the meetings, as well, and train those conducting the hearing in the intricacies of the applicable substantive and procedural law. "When due process converts agency processes into trial-type processes, decisional responsibility tends to shift toward those competent in those processes (lawyers) and to move away from those competent

with respect to substance [in this case, teachers and school administrators]." Alfred C. Aman, Jr., & William T. Mayton, Administrative Law 180 (1992).

Under *Mathews*, these costs are to be balanced against the risk of error in the normal case if the right to counsel is not granted. Courts considering this risk have noted that school administrators are in a position to know, or have access to records that will reveal, a student's disciplinary history, and whether the accuser and accused have had a past relationship that throws doubt on the accusation. *Newsome v. Batavia Local School District*, 842 F.2d 920, 925-26 (6th Cir. 1988). This has lead courts to express comfort with school discipline fact finders relying on hearsay evidence from school administrators, instead of requiring witnesses to appear for cross-examination by attorneys. *Boykins v. Fairfield Board of Education*, 492 F.2d 697, 701-02 (5th Cir. 1974). Given the relationship between school and community, schools lack an incentive to improperly expel students. *Osteen v. Henley*, 13 F. 3d 221, 226-(7th Cir. 1993).

In the present case, the mere exclusion of an attorney from the initial local hearing did not create any significant danger of error. That section of the Board policy (Appendix C,. pp. A22-23) applies only to the local hearing board's initial review of the principal's recommendation. Pursuant to that section, at the local review board's hearing, the student may bring an adult other than his or her parents to the proceeding. The non-parent may represent the student if the parents are not present; the non-parent's role is limited to that of an advisor, with no other function in the proceeding, if the parents are present. The one limitation this policy places on the non-parent is that this person cannot be an attorney at law. This is the only point in the policy where an attorney is not allowed. An attorney at law may represent the student before the Board of

Education (as happened here), as well as directly contact the school principal and superintendent.

The Board of Education's policy (found at Appendix C) as a whole allowed Nicholas to fully develop his response to the evidence gathered by the principal. The policy required the principal to state, in writing, the ground for the proposed suspension. The student and his parents were entitled, prior to the local board hearing, to review the principal's written statement and any other evidence gathered by the principal. The student and the parents were allowed, both before the review board and the Board of Education, to respond to these statements without providing any prior notice of what their response would be. The student and his parents were entitled to confront any witness at the review board hearing and call their own witnesses, by subpoena if necessary. If the matter were appealed to the Board of Education (as occurred here), the student and his parents were allowed the full benefit of an appearance by an attorney at law (as happened here). Thus, the Board of Education was given the benefit of the attorney's interpretation and argument of the evidence.

The only opportunity not allowed Petitioner here was to have the attorney directly cross-examine the witnesses who testified at the hearing board stage. However, had Petitioner wished to do so, he could have remedied this by requesting that the Board hear further evidence "to avoid a substantial threat of unfairness." (Appendix C, p. A24). Here, Petitioner and his attorney chose not to avail themselves of this right under the policy.

In light of the above, it is clear that the risk of error was not significantly increased by not allowing attorneys into the local hearing. By no means does the Board of Education minimize the importance of accuracy in the school discipline

process. However, in light of the small gain, if any, in accuracy that would be occasioned by the interjection of a right to counsel, there is insufficient justification for turning this process into a court proceeding.

D. The Federal Courts That Have Applied *Goss* and *Mathews* to Long-Term Suspensions and Expulsions Have Not Found That The Due Process Clause Requires A Right To Counsel

Multiple courts across the country have uniformly held that under *Goss* and *Mathews* there is no right to legal representation at student disciplinary hearings. In *Osteen v. Henley*, 13 F.3d 221 (7t" Cir. 1993) the court held that a university student had no constitutional right to counsel at student disciplinary hearing that led to his expulsion. Writing for the court, Judge Posner explained

> To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in — from the law faculty or elsewhere — to serve as judges. The cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc. Concern is frequently voiced about the bureaucratization of education, reflected for example in the high ratio of administrative personnel to faculty at all levels of American education today. We are reluctant to encourage further bureaucratization by judicializing university disciplinary proceedings....

Osteen, 13 F. 3d at 225.

Similarly, in *Gorman v. Univ. of Rhode Island*, 837 F.2d 7 (lst Cir. 1988) the 1st Circuit applied *Goss* and *Mathews* to an expulsion from a public university, and considered whether a right to counsel attached to the expulsion proceeding. The court warned:

> Although fairness in disciplinary procedures serves the goals of both students and schools alike, the burdens imposed on the schools may become unjustifiable. School administrators and courts recognize that "procedural requirements entail the expenditure of limited resources, [and] that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection. . . ." Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. [1267,] 1276. Hence, it is no exaggeration to state that the undue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counter-productive.

Gorman, 837 F. 2d at 14-15. Though the court found that other aspects of the school's procedure had violated due process, the court ruled that the right to counsel did not apply to the expulsion procedure.

Courts reaching the same conclusion as *Osteen* and Gorman include *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984) (holding that there is no right to counsel at a medical school disciplinary hearing in which plaintiff was dismissed for academic dishonesty); *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975) ("[T]he presence of attorneys or the imposition of rigid rules of cross-examination at a hearing for a student . . . would serve no useful purpose, notwithstanding that the dismissal in question may be of permanent duration.");

Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967) (noting that where the proceeding was non-adversarial and the government was not represented by counsel, student expelled from the U.S. Merchant Marine Academy was not entitled to counsel at the disciplinary hearing); *Dixon v. Alabama State Bd. of Educ.* 294 F.2d 150 (5th Cir. 1961) (finding no right to counsel at university disciplinary hearing, and further stating that "'a full dress judicial hearing, with the right to cross-examine witnesses" is not required because "such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out"); *Jaksa v. The Regents of the Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984) (explaining that, in a student disciplinary hearing, there is no right to counsel, no right to cross-examine your accuser, no right to a verbatim transcript of the proceedings, and no right to a detailed statement from the hearing panel detailing the reasons behind its decision).

Prior to the present decision by the North Carolina courts, since the Supreme Court decision in *Mathews*, there has been no decision holding that due process mandates that students have the opportunity for attorney representation at the evidentiary hearing. Only one court has identified an exception to this rule, and that was when the student was also facing potential criminal prosecution arising out of the same incident. *See Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978). It is also worth noting that the dissent in *Gabrilowitz* stressed that the United States Supreme Court rejected this very argument in the context of prison disciplinary hearings in *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976).

E. The Present State Court Holding Differs From the Analysis of the Fourth Circuit; Thus, Cases Will Be Decided Differently Depending on Whether They Are Filed in State or Federal Court.

In an unpublished holding, the Fourth Circuit has ruled that the right to counsel does not attach to the long term suspension of an eighth grade student. In that case, *Ratner v. Loudoun County Public Schools*, 16 Fed Appx. 140, 2001 WL 855606 (4th Cir. 2001) the student challenged his long-term suspension from October 1999 through the end of the semester in February 2000. One of the student's challenges was that the school's suspension process denied him due process. In the Fourth Circuit's opinion the court noted this challenge and denied it, holding that the school's process comported with *Goss*. *Ratner*, 16 Fed. Appx. at 142. The unreported decision of the federal district court reveals that part of the student's claim was the denial of right to counsel.

In the present case, the process also meets the test of *Goss*, but the state courts have now added the further requirement of a right to counsel, even at an initial investigative hearing. If the state court holding stands, determination of the impact of the due process clause on long term suspensions in North Carolina will rise and fall on whether the matter is litigated in state court or federal court. This undesirable result yields a further reason for review by this Court, and the establishment of clear guidelines for the application of the Due Process Clause to long-term suspensions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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